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No. _____

In the Supreme Court of the United States

KENNETH B. TERRY, PETITIONER,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A jury convicted petitioner of drug offenses carrying a statutory maximum sentence of 20 years imprisonment. The district judge sentenced petitioner to 27 years, however, based on post-trial findings — under a preponderance of the evidence standard — regarding petitioner's prior felony conviction and the quantity of drugs he distributed. The questions presented are:

1. Whether *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which held that a district judge's post-trial findings concerning a defendant's prior conviction(s) may be used to impose a sentence beyond the statutory maximum authorized by the jury verdict, should be overruled in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000).

2. Whether, in light of *Apprendi*, the Fifth and Sixth Amendments preclude district judges from using post-trial drug quantity findings to impose a sentence longer than the statutory maximum authorized by the jury's verdict, and whether the district court's error in this regard was plain error.

This case also presents an independent question, which may be considered separate and apart from the first two questions presented:

3. Whether, in light of *Apprendi*, the Fifth and Sixth Amendments preclude district judges from using post-trial findings to impose a sentence under the Sentencing Guidelines that exceeds the maximum Guidelines sentence that could have applied if only the jury verdict had been considered.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 10

A. Whether *Almendarez-Torres* Should Be Overruled Presents An Important Constitutional Question That Only This Court Can Resolve. 11

B. The Court Should Resolve Whether The Fifth And Sixth Amendments Preclude District Judges From Using Post-Trial Drug Quantity Findings To Impose A Sentence Longer Than The Statutory Maximum Authorized By The Jury Verdict. 15

C. The Court Should Resolve Whether The Fifth And Sixth Amendments Preclude District Judges From Using Post-Trial Findings To Impose A Sentence Under The Sentencing Guidelines That Exceeds The Maximum Guidelines Sentence That Could Have Applied If Only The Jury Verdict Had Been Considered 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases:

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) ..... *passim*

Apprendi v. *New Jersey*, 120 S. Ct. 2348 (2000) .... *passim*

Johnson v. *United States*, 520 U.S. 461 (1997) ... 17, 18, 19

Jones v. *United States*, 526 U.S. 227 (1999) 13, 22

McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) ... 3, 12, 21

Monge v. *California*, 524 U.S. 721 (1998) 11

State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 13

Talbott v. *Indiana*, 226 F.3d 866 (7th Cir. 2000) 21

United States v. *Aguayo-Delgado*, 220 F.3d 926 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000) 16

United States v. *Baltas*, 236 F.3d 27 (1st Cir. 2001) .. 10, 21

United States v. *Butler*, 238 F.3d 1001 (8th Cir. 2001) ... 17

United States v. *Chapa-Garza*, 2001 WL 209468 (5th Cir. Mar. 1, 2001) 13

United States v. *Doggett*, 230 F.3d 160 (5th Cir. 2000) . 15, 21

United States v. *Fields*, 242 F.3d 393 (D.C. Cir. 2001) .. 16, 17

TABLE OF AUTHORITIES — Continued

Page

United States v. *Garcia*, 240 F.3d 180 (2d Cir. 2001) 21

United States v. *Gatewood*, 230 F.3d 186 (6th Cir. 2000) ... 14

United States v. *Harris*, 238 F.3d 777 (6th Cir. 2001) ... 21

United States v. *Heckard*, 238 F.3d 1222 (10th Cir. 2001) .. 21

United States v. *Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000) 21

United States v. *Jones*, 235 F.3d 1231 (10th Cir. 2000) .. 16

United States v. *Kinter*, 235 F.3d 192 (4th Cir. 2000), cert. denied (March 19, 2001) (No. 00-8591) 21

United States v. *Lewis*, 236 F.3d 948 (8th Cir. 2001) 21

United States v. *Mack*, 229 F.3d 226 (3d Cir. 2000) 14

United States v. *Nance*, 236 F.3d 820 (7th Cir. 2000) 16

United States v. *Nealy*, 232 F.3d 825 (11th Cir. 2000) ... 22

United States v. *Nordby*, 225 F.3d 1053 (9th Cir. 2000) .. 16

United States v. *Nunes*, 2000 WL 1741890 (N.D. Ill. Nov. 22, 2000) 14

United States v. *Olano*, 507 U.S. 725 (1993) 18

United States v. *Pacheco-Zepeda*, 234 F.3d 411 (9th Cir. 2000) 13

TABLE OF AUTHORITIES — Continued

Page

United States v. *Ramirez*, 242 F.3d 348 (6th Cir. 2001), cert. denied, 121 S. Ct. 1152 (2001) 16

United States v. *Rogers*, 228 F.3d 1318 (11th Cir. 2000) . 16

United States v. *Thomas*, 242 F.3d 1028 (11th Cir. 2001) .. 14

United States v. *Watts*, 519 U.S. 148 (1997) 23

United States v. *Williams*, 235 F.3d 858 (3d Cir. 2000) .. 21

Statutes:

18 U.S.C. § 3553(b) 22

21 U.S.C. § 841 ..... *passim*

21 U.S.C. § 846 ..... 3, 4

Sentencing Guidelines:

U.S.S.G. § 2D1.1 ..... 6, 7

U.S.S.G. § 5G1.1(a) 22

Miscellaneous:

Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992) 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Terry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-19a) is reported at 240 F.3d 65. The district court did not render a written sentencing opinion, but relevant portions of the district court record are set forth below (App., *infra*, 21a-24a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

The full text of 21 U.S.C. § 841 is reproduced in the appendix at App., *infra*, 25a-35a.

STATEMENT

Section 841(b)(1) of Title 21 establishes several possible maximum sentences for a defendant convicted under § 841 of distributing cocaine or cocaine base ("crack"). Of the various factors that determine the applicable maximum, only two are relevant here: the quantity of drugs distributed, and whether the defendant has a prior felony drug conviction. A defendant who distributes an indeterminate quantity of drugs and who has no prior felony drug conviction faces a 20-year maximum. *Id.* § 841(b)(1)(C). A prior felony drug conviction raises the maximum to 30 years. *Ibid.* A defendant convicted of an offense involving at least 5 grams of crack or 500 grams of cocaine faces a maximum of 40 years, while an offense involving at least 50 grams of crack or 5 kilograms of cocaine yields a maximum of life. *Id.* § 841(b)(1)(A), (B).

A jury convicted petitioner for violating § 841, but did not find that the charged offenses involved a particular amount of drugs or that he had a prior felony drug conviction. Based on the jury verdict, the statutory maximum sentence was 20 years. *Id.* § 841(b)(1)(C). However, the court of appeals held that the statutory maximum was 30 years, not 20 years, due to the district judge's post-trial finding, made under a preponderance of the evidence standard, that petitioner had a prior felony drug conviction. *Ibid.* In the alternative, the court of appeals held that the statutory maximum was life, due to the district judge's post-trial finding, also under a preponderance standard, that the transactions underlying petitioner's convictions involved more than 50 grams of crack. Applying the Sentencing Guidelines, the district court sentenced petitioner to 27 years imprisonment after finding that the drug transactions charged in the indictment and considered by the jury, together with uncharged "relevant conduct," involved over two kilograms of crack.

On appeal, petitioner contended that because the statutory maximum for the crime of conviction was 20 years, petitioner's 27-year sentence is unconstitutional under the principles set forth in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). The First Circuit rejected petitioner's challenge on the ground that *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), allowed the district judge to use post-trial findings regarding petitioner's prior conviction to exceed the 20-year statutory maximum authorized by the jury verdict. Like many other Circuits, the First Circuit recognized that *Apprendi* cast doubt upon the continued validity of *Almendarez-Torres*, but concluded that it was bound by *Almendarez-Torres*. This case squarely presents the question, which can be resolved only by this Court, of whether *Almendarez-Torres* should be overruled.

In addition, this case presents the independent and equally important question of whether, under the principles set forth in *Apprendi*, the district judge was prohibited from making post-trial drug quantity findings to increase petitioner's sentence beyond the Guidelines range that would have applied had only the jury's findings been considered.[1] Here, the post-trial quantity findings increased petitioner's Guidelines sentence from a maximum of 27 *months* to a minimum of 27 *years*, thus allowing the sentencing "tail" to "wag[] the dog of the substantive offense." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986).

1. An indictment charged petitioner with five narcotics-related crimes. One count alleged a conspiracy to distribute cocaine and crack in violation of 21 U.S.C. § 846.

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[1] The Court could consider and resolve the Guidelines question (the third question presented) without considering the *Almendarez-Torres* question (the first question presented) and the drug quantity question (the second question presented), or *vice-versa*.

Three other counts alleged distribution of crack in violation of § 841(a). The final count originally alleged attempted possession of crack with intent to distribute in violation of §§ 841(a)(1) & 846, but was amended during trial to change the charged drug from crack to cocaine. App., *infra*, 4a n.2.

2. At trial, the government sought to prove that petitioner was a dealer of crack and cocaine. Petitioner presented an entrapment defense. The jury convicted on all five counts, but made no findings regarding drug quantities or prior felony drug convictions. Accordingly, based upon the verdict, petitioner faced a statutory maximum sentence of 20 years. 21 U.S.C. § 841(b)(1)(A).

3. After trial, the district judge made two findings, under a preponderance of the evidence standard, that were used to impose a sentence greater than 20 years. First, the district judge found that petitioner had a prior felony drug conviction. PSR ¶¶ 173, 230; Disposition at 20. Second, the judge found that the three § 841(a) counts involved 121.5 grams, 250 grams, and 248.4 grams of crack, respectively. PSR ¶¶ 149-51; Disposition at 20.[2] Based upon these two factual findings, the

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[2] Although petitioner was convicted of five counts, only those three mattered for sentencing. The amended § 841 count was not relevant because, in light of the amendment, the district court held that the count would not affect petitioner's sentence. App., *infra*, 4a n.2, 21a-22a. The § 846 count was not relevant because defendants found guilty under § 846 "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846. Here, the alleged object of the conspiracy was to violate § 841, and therefore the penalty under § 846 did not add anything that the three § 841 convictions did not already require. App., *infra*, 14a n.5.

district court concluded that it was able to impose a sentence of greater than 20 years.

a. *The Statutory Scheme*. Section 841(a) punishes "unlawful acts," while section 841(b) establishes a range of penalties for violations of subsection (a). Subsection (b)(1) establishes three tiers of progressively less stringent penalties for crack and cocaine offenses. The (b)(1)(A) tier applies when a defendant distributes 5 or more kilograms of cocaine, or 50 or more grams of crack, and carries a maximum sentence of life. 21 U.S.C. § 841(b)(1)(A). The (b)(1)(B) tier applies when the defendant distributes 500 grams or more of cocaine, or 5 grams or more of crack. The maximum sentence is 40 years, but increases to life if the defendant has a prior felony drug conviction. *Id.* § 841(b)(1)(B). Finally, the (b)(1)(C) tier applies when the defendant is convicted of distributing an unspecified quantity cocaine and/or crack. The maximum sentence is 20 years, but increases to 30 years if the defendant has a prior felony drug conviction. *Id.* § 841(b)(1)(C).

b. *The Statutory Maximum In This Case*. The jury did not find that petitioner distributed any particular quantity of drugs, or that he had a prior felony drug conviction. Thus, the jury convicted petitioner of a crime governed § 841(b)(1)(C), which authorizes a statutory maximum sentence of 20 years.

In post-trial proceedings, and based largely upon the pre-sentence report ("PSR"), the district judge found by a preponderance of the evidence that the three § 841 counts each involved more than 50 grams of crack. Pursuant to those findings, the district court determined that petitioner was subject to the (b)(1)(A) sentencing tier, with a maximum sentence of life. PSR ¶ 230.

c. *The Guidelines Sentence Imposed.* The PSR determined the Guidelines range, using the 11/1/98 manual (which is the version cited herein), as follows.

First, the PSR (¶ 145) grouped the convictions pursuant to U.S.S.G. § 2D1.1.

Second, the PSR (¶¶ 154-56) computed the base offense level by determining the total quantity of drugs "attributable" to petitioner's conduct. This aggregated to 2.7 kilos of crack and 370.9 grams of cocaine. (The role of "relevant conduct" in establishing these figures is set forth below.) This resulted in a base offense level of 38.

Third, the PSR (¶¶ 176-78), as amended,[3] calculated petitioner's criminal history score as 5, and then added two points to reflect the fact that the convictions occurred while petitioner was serving a prior sentence. This led to criminal history category of IV.

Finally, the base offense level of 38,[4] combined with the criminal history category of IV, produced a Guidelines range of 324-405 months.

The district court sentenced petitioner to 324 months (27 years), at the lowest end of the applicable Guidelines range, with each count to run concurrently. App., *infra*, 22a. The Court added a 10-year term of supervised release. *Ibid.*

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[3] The PSR initially indicated that petitioner was a career offender because he had two prior felony convictions. One conviction was subsequently vacated, and the PSR was amended accordingly. PSR ¶ 169 & 12/2/99 modification.

[4] The PSR recommended a two-level increase (from 38 to 40) for obstruction of justice, which the district court rejected. PSR ¶ 141; Disposition at 20. For ease of reference, we have removed the two-level increase from the PSR's calculation of the guidelines range.

d. *The Role Of "Relevant Conduct" And Quantity Findings In The Guidelines Calculation.* The 2.7 kilos of crack and 370.9 grams of cocaine "attributed" to petitioner by the district judge determined his base offense level under the Guidelines. Only a small portion of these quantities involved the transactions for which petitioner was convicted. The vast portion — two kilograms of crack — related to so-called "relevant conduct" consisting of drug transactions that were neither charged in the indictment nor considered at trial, let alone found by the jury to have occurred beyond a reasonable doubt. PSR ¶ 152. Without these two kilograms, petitioner's base offense level would have dropped from 38 to 36,[5] and the Guidelines range would have dropped from 324-405 months to 262-327 months. If petitioner had been sentenced to the bottom of the revised range, his sentence would have been more than five years shorter.

The Guidelines range would have plummeted even further if all post-trial quantity findings — for both the charged and uncharged transactions — were set aside. The base offense level would have been 12,[6] and the sentencing range would be 21-27 months. Thus, under the Guidelines, petitioner's sentence is more than 24 years longer than the highest it could have been had it been based solely on the jury's verdict.

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[5] This number is derived by converting the remaining 706 grams of crack and 370.9 grams of cocaine to marijuana weights under the equivalency tables at U.S.S.G. § 2D1.1, and then matching the marijuana weight (14,194.18 KG) to the appropriate base offense level under the drug quantity table at U.S.S.G. § 2D1.1(c).

[6] Under the Drug Quantity Table, 12 is the base offense level for "less than" 250 mg of crack. U.S.S.G. § 2D1.1(c).

4. Petitioner appealed to the First Circuit. After petitioner filed his opening brief, but before oral argument, this Court decided *Apprendi*, which held that: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63. The Court's opinion and Justice Thomas's concurrence expressly called *Almendarez-Torres* into question. See *infra* at 12.

Petitioner (with leave of court) filed a supplemental brief seeking relief under *Apprendi*. He argued that *Apprendi* required that "any fact that increases the prescribed range of penalties to which a defendant is exposed must be charged in the indictment and submitted to the jury." Def. Supp. Br. 3. He then maintained that the district court violated *Apprendi* by using two post-trial findings — regarding drug quantities and petitioner's prior felony drug conviction — to increase the statutory maximum sentence beyond that authorized by the jury verdict. *Id.* at 8-12. Petitioner recognized that his argument with respect to the prior conviction conflicted with *Almendarez-Torres*, but argued that *Apprendi* had effectively overruled *Almendarez-Torres*. *Id.* at 11-12. Petitioner also argued that it was unconstitutional to calculate the Guidelines base offense level by using the district judge's post-trial drug quantity findings for both the charged conduct and the "relevant conduct." *Id.* at 12-15.

The government conceded that *Apprendi* requires that the jury determine the presence or absence of the triggering drug weights for the different penalty tiers under § 841. Gov. Supp. Br. 1 n.2, 6-7. However, the government argued that the court of appeals could not disregard *Almendarez-Torres*, which validated the district judge's post-trial finding that petitioner had a prior conviction, which in turn increased petitioner's maximum sentence to 30 years. *Id.* at 6-9. Because the 30-year

maximum was greater than petitioner's 27-year sentence, the government argued that *Apprendi* was inapplicable. *Ibid.*

The government also conceded that if *Almendarez-Torres* were no longer good law, then petitioner has satisfied the first two prongs of plain error review by showing a "clear and obvious" error. *Id.* at 9. The government argued, however, that any error was insubstantial because the jury was presented with sufficient evidence to find the triggering weights under the § 841(b)(1)(A), which allowed a maximum sentence of life. *Id.* at 9-10.

Finally, the government contended that petitioner's constitutional challenge to the Guidelines calculation failed because *Apprendi* does not preclude the district judge from making findings that alter the determinate sentencing range below the statutory maximum. *Id.* at 13.

5. The First Circuit affirmed. The court first held that it was bound by *Almendarez-Torres*, which validated the district judge's post-trial finding that petitioner had a prior felony drug conviction. App., *infra*, 16a-17a. That finding increased petitioner's maximum sentence to 30 years under § 841(b)(1)(C). Because petitioner's 27-year sentence was less than the statutory maximum, the Court found no constitutional error under *Apprendi*. App., *infra*, 17a.

The First Circuit then held that the district judge's drug quantity findings on the charged counts provided an alternative ground for affirming the 27-year sentence under *Apprendi*. The court assumed without deciding that *Apprendi* prohibited the district judge from using post-trial drug quantity findings to move petitioner from the (b)(1)(C) tier to the (b)(1)(A) tier. App., *infra*, 17a. However, noting that petitioner did not object in the district court, the First Circuit held that any error was insubstantial under prongs three and four of the plain error standard because the jury would have found the triggering drug

quantities under (b)(1)(A) had it been asked to do so. App., *infra*, 18a. This, the court explained, would have resulted in a maximum sentence of life. The court therefore concluded that even if *Almendarez-Torres* were overruled, petitioner's sentence still would be constitutional.

Finally, the First Circuit rejected petitioner's contention that *Apprendi* forbids the district judge to use post-trial drug quantity findings to determine the applicable Guidelines sentencing range. App., *infra*, 13a, 16a.[7] See also *United States* v. *Baltas*, 236 F.3d 27, 41 (1st Cir. 2001) (*Apprendi* does not apply to district judge's use of post-trial drug quantity finding to establish a Guidelines range within the statutory maximum).

REASONS FOR GRANTING THE PETITION

Petitioner's sentence is at least seven years too long. Only this Court has the authority to grant petitioner relief because the obstacle to relief is *Almendarez-Torres*, which, absent further action from this Court, will continue to bind the courts of appeals. The Court should grant certiorari to decide the question that only it can resolve: whether *Almendarez-Torres* remains good law after *Apprendi*.

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[7] The First Circuit's treatment of petitioner's Guidelines argument incorrectly assumed that petitioner agreed that "if the 30 year maximum for the prior felony conviction holds, then there is no *Apprendi* issue in this case as to whether the jury must determine whether the trigger point in the drug quantity range had been met." App., *infra*, 16a. In fact, petitioner expressly maintained — and the government disputed — that *Apprendi* should apply to judge-made findings that increase a Guidelines range beyond what is authorized by the jury's verdict, even where the sentence does not exceed the statutory maximum. Def. Supp. Br. 14; Gov. Supp. Br. 12-14.

This case presents an independent and equally important question: whether *Apprendi* bars district judges from making post-trial findings to increase a defendant's determinate Sentencing Guidelines range beyond the range that would have applied if only the jury verdict were considered. Here, such post-trial findings increased petitioner's sentence from 27 *months* to 27 *years*.

A. Whether *Almendarez-Torres* Should Be Overruled Presents An Important Constitutional Question That Only This Court Can Resolve.

Apprendi preserves *Almendarez-Torres*'s holding while eviscerating its premise. As all nine Justices recognized in *Apprendi*, the Court's respect for *stare decisis* came at the expense of doctrinal coherence.

The Court in *Apprendi* held: "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63 (emphasis added). The Court included the carve-out for prior convictions only because of *Almendarez-Torres*, which rejected a constitutional attack on the use of post-trial prior conviction findings to enhance sentences beyond the statutory maximum authorized by the jury's verdict. See *Almendarez-Torres*, 523 U.S. at 239-48.

Almendarez-Torres is incompatible with the rationale underlying *Apprendi*. The Court has characterized *Almendarez-Torres* as "reject[ing] an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Monge* v. *California*, 524 U.S. 721, 729 (1998). Yet *Apprendi* embraces that very rule, subject only to a carve-out for prior-conviction enhancements:

> When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense."

Apprendi, 120 S. Ct. at 2365, quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986). Contra *Almendarez-Torres*, 523 U.S. 243 (quoting the same language from *McMillan* to reach an opposite conclusion).

The Court's opinion, Justice Thomas' concurrence, and the principal dissent in *Apprendi* all recognized the tenuous foundation on which *Almendarez-Torres* now sits. The Court stated that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Apprendi*, 120 S. Ct. at 2362; see also *id.* at 2361 ("*Almendarez-Torres* * * * represents at best an exceptional departure from the historic practice that we have described"); *id.* at 2362 n.15. The Court did not overrule *Almendarez-Torres*, however, because *Apprendi* did not directly raise the issue. *Id.* at 2362. Justice Thomas expressly stated that *Almendarez-Torres*, for which he provided the fifth vote, was incorrectly decided. See *id.* at 2379 (Thomas, J., concurring) ("the fact of a prior conviction is an element under a recidivism statute").

The principal *Apprendi* dissent likewise recognized that *Almendarez-Torres* and *Apprendi* cannot be harmonized. *Id.* at 2387 (O'Connor, J., dissenting) ("*Almendarez-Torres* constituted a clear repudiation of the rule the Court adopts today."). The dissent went on to state:

> That the New Jersey statute [invalidated in *Apprendi*] provides an enhancement based on the defendant's motive while the statute in

> *Almendarez-Torres* provided an enhancement based on the defendant's commission of a prior felony is a difference without constitutional importance.

Id. at 2396 (O'Connor, J., dissenting).[8] The dissent was correct: there is no meaningful difference between the enhancements in *Apprendi* and *Almendarez-Torres*, which means that *Apprendi* and *Almendarez-Torres* cannot be reconciled.

Questions concerning the viability of *Almendarez-Torres* recur with great frequency, but the lower courts are powerless to inter *Almendarez-Torres*. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents"). This has caused some frustration, as the lower courts recognize that *Almendarez-Torres* is in doubt but conclude that there is nothing they can do about it. *See United States* v. *Chapa-Garza*, 2001 WL 209468, at *6 (5th Cir. Mar. 1, 2001) ("no matter how much in doubt the continuing viability of *Almendarez-Torres* may be, that decision is not overruled unless and until the United States Supreme Court says it is"); *United States* v. *Pacheco-Zepeda*, 234 F.3d 411, 413 (9th Cir. 2000) ("If the views of the Supreme Court's individual Justices and the composition of the Court

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[8] The dissenting Justices in *Apprendi* made the same point in dissent in *Jones* v. *United States*, 526 U.S. 227, 269 (1999) (Kennedy, J., dissenting):

> the statute at issue in *Almendarez-Torres* made recidivism a sentencing factor, while the sentencing factor at issue here is serious bodily injury. This is not a difference of constitutional dimension, and *Almendarez-Torres* does not say otherwise.

remain the same, *Almendarez-Torres* may eventually be overruled. But such speculation does not permit us to ignore controlling Supreme Court authority") (footnote omitted), cert. denied (April 2, 2001) (No. 00-8814); *United States* v. *Thomas*, 242 F.3d 1028, 1035 (11th Cir. 2001) (defendant's "urging that we should get ahead of the Supreme Court and beat it to the punch by overruling *Almendarez-Torres* ourselves overlooks the very basic fact that we cannot overrule Supreme Court decisions"); *United States* v. *Mack*, 229 F.3d 226, 238 n.5 (3d Cir. 2000) (Becker, C.J., concurring) ("I do not suggest that we should predict that the Court will overturn *Almendarez-Torres* * * * [b]ut the apprehension remains"); *United States* v. *Nunes*, 2000 WL 1741890, at *2 (N.D. Ill. Nov. 22, 2000) ("Although we agree with defendant that the court's reasoning in *Apprendi* seems to undermine the holding in the *Almendarez-Torres* case, we agree with the government that we must follow *Almendarez-Torres* unless the Supreme Court explicitly overrules that case"). See also *United States* v. *Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000) (en banc) ("Although the Court's decision in *Apprendi* arguably casts doubt on the correctness of the holding in *Almendarez-Torres*, * * * [it] remains the law"); *id.* at 193 (Merritt, J., dissenting) (criticizing majority for "fail[ing] to consider the *Apprendi* Court's severe limitation of *Almendarez-Torres*").

Accordingly, the Court should grant certiorari to resolve this important constitutional question. As the court of appeals recognized here, the lower courts are powerless to resolve that question themselves, but must await action by this Court.

B. The Court Should Resolve Whether The Fifth And Sixth Amendments Preclude District Judges From Using Post-Trial Drug Quantity Findings To Impose A Sentence Longer Than The Statutory Maximum Authorized By The Jury Verdict.

The district judge also made post-trial findings concerning the quantity of drugs involved in the transactions for which petitioner was convicted. Pursuant to those findings, the district court concluded that petitioner should be sentenced under the (b)(1)(A) tier, with a maximum of life. If only the jury's verdict had been considered, petitioner would have been sentenced under the (b)(1)(C) tier.

There is no dispute that the district court's use of post-trial drug quantity findings to enhance petitioner's sentence beyond the otherwise applicable maximum violated *Apprendi*. The government conceded the point below, see *supra* at 8, and the Solicitor General has conceded the same point in prior cases before this Court.[9] The courts of appeals have consistently held that district courts violate *Apprendi* when they do what the district court did here.[10]

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[9] See, *e.g.*, Brief for the United States, *Moore* v. *United States*, Nos. 00-7021 & 00-7070, at 15 (filed Feb. 28, 2001); Brief for the United States, *Whitt* v. *United States*, No. 00-183, at 4 (filed Oct. 3, 2000) ("Because the life sentence imposed on petitioner exceeded the prescribed statutory maximum for the type of drug involved without a showing as to quantity (see 21 U.S.C. 841(b)(1)C)), imposition of that sentence on the basis of a drug quantity determination made by the court was error under the Court's decision in *Apprendi*").

[10] See *United States* v. *Doggett*, 230 F.3d 160, 164 (5th Cir. 2000) ("there is no reasonable construction of § 841 that would allow us to avoid the broad constitutional rule of

This case presents an ideal opportunity for the Court to remove any doubt over whether *Apprendi* prohibits post-trial drug quantity findings that have the effect of enhancing a sentence beyond the statutory maximum authorized by the jury verdict. Moreover, given the First Circuit's alternative holdings against petitioner, resolving this question would allow the Court to reach and resolve the *Almendarez-Torres* issue.

The government will contend that this case is a poor vehicle because petitioner did not object in the district court to the use of post-trial drug quantity findings to move petitioner from the (b)(1)(C) sentencing tier to the (b)(1)(A) tier. Noting petitioner's failure to object, the First Circuit held that even if the district court violated *Apprendi*, no appellate remedy was appropriate because the error was not plain. App., *infra*, 14a-15a, 17a.

The First Circuit's plain error ruling was legally incorrect, and therefore does not affect this Court's ability to resolve the underlying constitutional question. The plain error standard provides that to justify an appellate remedy, there must be:

> (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its

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Apprendi"); *United States* v. *Ramirez*, 242 F.3d 348, 351 (6th Cir. 2001), cert. denied, 121 S. Ct. 1152 (2001); *United States* v. *Nance*, 236 F.3d 820, 825 (7th Cir. 2000); *United States* v. *Aguayo-Delgado*, 220 F.3d 926 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000); *United States* v. *Nordby*, 225 F.3d 1053, 1058-59 (9th Cir. 2000); *United States* v. *Jones*, 235 F.3d 1231, 1236 (10th Cir. 2000); *United States* v. *Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000); *United States* v. *Fields*, 242 F.3d 393, 395-96 (D.C. Cir. 2001).

> discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Johnson v. *United States*, 520 U.S. 461, 467 (1997) (internal quotations omitted).

The government conceded below that the first two prongs of the plain error test were satisfied. Gov. Supp. Br. at 9.[11] However, the government argued (*id.* at 9-10), and the court of appeals agreed, that any sentencing error was not "substantial" under the third prong of plain error review, and therefore was not a miscarriage of justice under the fourth prong. This is so, the court of appeals reasoned, because the jury had sufficient evidence to find that the charged counts involved more than 50 grams of crack, and therefore that petitioner's crimes fell within the (b)(1)(A) sentencing tier. App., *infra*, 18a.

The First Circuit's plain error analysis is premised upon a fundamental misreading of *Apprendi*. The court assumed, consistent with the government's submission, that the error alleged by petitioner involved jury instructions — *i.e.*, that the district court erred by failing to instruct the jury on drug weights. That was incorrect. Petitioner did not argue that the district court had improperly instructed the jury with respect to

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[11] Accord *United States* v. *Fields*, 242 F.3d 393, 396 (D.C. Cir. 2001); *United States* v. *Butler*, 238 F.3d 1001, 1005 (8th Cir. 2001); Brief for the United States, *Moore* v. *United States*, Nos. 00-7021 & 00-7070, at 15 (filed Feb. 28, 2001) ("The error in imposing sentences [under 21 U.S.C. § 841(b)(1)] based on quantity findings made by the district court was 'plain,' in that it was 'clear' or 'obvious' after the decision in *Apprendi*").

drug quantities. Rather, the district court's error was sentencing petitioner for the wrong crime — that is, under § 841(b)(1)(A) instead of § 841(b)(1)(C).

The (b)(1)(A) and (b)(1)(C) tiers "constitute different crimes." *Apprendi*, 120 S. Ct. at 2360 (internal quotations omitted). The jury convicted petitioner of the lesser crime (§ 841(b)(1)(C)), but the district judge imposed sentence for the aggravated crime (§ 841(b)(1)(A)). Under *Apprendi*, the only relevant question is whether the sentence for the aggravated crime is higher than the statutory maximum for the lesser crime. See *id.* at 2359. The First Circuit's assertion that petitioner *could* have been convicted of the aggravated crime, and therefore was not prejudiced under *Apprendi*, misses the point, since *Apprendi* provides that petitioner may be sentenced only for the crime of which he was convicted. Here, petitioner's 27-year sentence exceeded the 20-year maximum under § 841(b)(1)(C), so petitioner was clearly prejudiced. It follows that the First Circuit's plain error analysis is plainly wrong, and therefore does not counsel against certiorari on petitioner's underlying constitutional claim.

There is an independent reason why the court of appeals' plain error holding is incorrect. That is because plain error analysis should not have been applied in the first place.

It is true that failure to object in the district court ordinarily precludes appellate review for all but "plain error." See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 732-37 (1993). And, under ordinary circumstances, the fact that an appellate court has not yet announced an applicable holding does not absolve a defendant of the duty to anticipate such holdings in the district court. See *Johnson*, 520 U.S. at 466-67.

This case falls outside the ordinary. To make his *Apprendi* argument at the time of sentencing, petitioner needed far more than a new holding. Rather, he needed the outright

overruling of *Almendarez-Torres*, a controlling precedent that was less than two years old and that had not yet been subsequently questioned by this Court. Because any objection to the district judge's post-trial prior conviction finding would have been frivolous, petitioner had no legitimate grounds to object to the conclusion that his maximum statutory sentence was 30 years, instead of 20 years, under § 841(b)(1)(C). And because petitioner was sentenced to 27 years, which was less than the 30-year maximum applicable under *Almendarez-Torres*, it would have been pointless to object to the district judge's post-trial drug quantity findings, which had the (ultimately irrelevant) effect of raising the statutory maximum to life.

By applying the plain error standard, the court of appeals penalized petitioner for not making a patently frivolous objection. The First Circuit's application of the plain error standard, if valid, would require defense counsel to make frivolous objections in the district court based on speculation that currently binding precedents might be overruled. That cannot and should not be the law.[12]

Accordingly, not only did the court of appeals err in holding that the district court's *Apprendi* error was not plain error, but the court of appeals should not have applied plain

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[12] This Court has recognized that such issue-preserving motion practice is an empty formality that should not be encouraged. In *Johnson*, the issue was whether an error is "clear" under the plain error standard if it is apparent at the time of appeal, but not at the time of trial. See 520 U.S. at 467-68. The Court held that a rule forcing lawyers to object to settled law at the time of trial in order to preserve points for appeal "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Ibid.*

error analysis in the first place. Either way, the First Circuit's plain error analysis does not pose an obstacle to this Court's consideration of petitioner's underlying constitutional claim.

C. The Court Should Resolve Whether The Fifth And Sixth Amendments Preclude District Judges From Using Post-Trial Findings To Impose A Sentence Under The Sentencing Guidelines That Exceeds The Maximum Guidelines Sentence That Could Have Applied If Only The Jury Verdict Had Been Considered.

If petitioner had been sentenced based solely on the facts found by the jury beyond a reasonable doubt, his Guidelines range would have been 21-27 months. See *supra* at 7. The district judge's post-trial drug quantity findings, made under a preponderance of the evidence standard and involving transactions for which petitioner was neither charged nor convicted, increased the Guidelines range to 324-405 months. This had the effect of increasing petitioner's sentence from a maximum of 27 *months* to a minimum of 27 *years*.

The Guidelines sentencing regime turned petitioner's jury trial into the undercard, an opening act preceding the main event of sentencing. In the most practical sense, the facts proved beyond a reasonable doubt at trial pale in significance to the district judge's post-trial findings.

It would have been bad enough had the district judge's findings been limited to the transactions for which the jury had convicted petitioner. However, the bulk of the drugs attributed to petitioner under the Guidelines involved "relevant conduct" — conduct that was not charged in the indictment or proved at trial, and for which the jury returned no conviction. The Guidelines thus permitted the government to circumvent the constitutional requirement of conviction by jury with a more expedient "conviction by sentencing." Put another way, using

the district judge's post-trial findings to increase petitioner's sentence from 27 months to 27 years severed the "historic link between verdict and judgment" animating the Fifth and Sixth Amendments. *Apprendi*, 120 S. Ct. at 2359.[13]

This case presents a question of extraordinary importance to the criminal justice system: whether the Guidelines sentencing regime, as applied in this case and in general, violates the Fifth and Sixth Amendments. The courts of appeals, considering themselves constrained by this Court's precedents, have held that post-trial findings that increase the Guidelines range are constitutional so long as the ultimate sentence falls within the statutory maximum.[14] These holdings

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[13] See also *McMillan*, 477 U.S. at 88 (when a putative sentencing enhancement is a "tail which wags the dog of the substantive offense," it should be treated as an element of the crime). Here, the district judge's post-trial findings not only "wag" the substantive offense, they overshadow it completely. See generally Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992).

[14] See, e.g., *United States* v. *Baltas*, 236 F.3d 27, 41 (1st Cir. 2001); *United States* v. *Garcia*, 240 F.3d 180, 183-84, 186 (2d Cir. 2001); *United States* v. *Williams*, 235 F.3d 858, 863-64 (3d Cir. 2000); *United States* v. *Kinter*, 235 F.3d 192, 200-02 (4th Cir. 2000), cert. denied (March 19, 2001) (No. 00-8591); *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 121 S. Ct. 1152 (2001); *United States* v. *Harris*, 238 F.3d 777, 779 (6th Cir. 2001); *Talbott* v. *Indiana*, 226 F.3d 866, 869-70 (7th Cir. 2000); *United States* v. *Lewis*, 236 F.3d 948, 950 (8th Cir. 2001); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1026-27 (9th Cir. 2000); *United*

automatically insulate such findings from constitutional scrutiny because the Guidelines themselves, U.S.S.G. § 5G1.1(a), prohibit the imposition of sentences exceeding the statutory maximum.

This Court's decision in *Apprendi* casts grave doubt upon the constitutionality of petitioner's Guidelines sentence. *Apprendi* holds that "[a]s a matter of simple justice," the "procedural safeguards" established by the Fifth and Sixth Amendments govern fact-finding on matters that the government has "singled out for punishment." 120 S. Ct. at 2355. Under *Apprendi*, "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Id.* at 2363, quoting *Jones*, 526 U.S. at 252-53 (opinion of Stevens, J.).

The Guidelines — determinate in nature and binding by statute, *see* 18 U.S.C. § 3553(b) — impose precisely such a "prescribed range of penalties." The applicable Guidelines range depends upon post-trial findings made by the district judge under a preponderance of the evidence standard. Some of those findings concern facts (*e.g.*, drug quantities) that, while not specifically found by the jury, at least involve criminal acts for which defendant was convicted. Other findings concern facts involving "relevant conduct," meaning allegations neither charged in the indictment nor found by the jury.

Such post-trial findings by the district judge logically fall within the prohibition set forth in *Apprendi*. Justice Thomas strongly suggested that this was the case. See *Apprendi*, 120 S. Ct. at 2380 n.11 (Thomas, J., concurring). And the principal dissent warned that *Apprendi* could "have the

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States v. *Heckard*, 238 F.3d 1222, 1235-36 (10th Cir. 2001); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000).

effect of invalidating" sentencing schemes such as the Sentencing Guidelines. *Id.* at 2394-95 (O'Connor, J., dissenting). See also *id.* at 2391 (O'Connor, J., dissenting) ("Justice THOMAS essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines.").

The Court did not have occasion in *Apprendi* to address whether the Fifth and Sixth Amendments preclude district judges from using post-trial findings to impose a Guidelines sentence exceeding the Guidelines range that would have applied if only the jury verdict had been considered. *Id.* at 2366 n.21 (Although "[t]he principal dissent * * * treats us to a lengthy disquisition on * * * the effect of today's decision on the federal Sentencing Guidelines," the "Guidelines are, of course, not before the Court"). See also *United States* v. *Watts*, 519 U.S. 148, 166 n.4 (1997) (Stevens, J., dissenting) (serious constitutional questions raised when post-trial findings are used to "shift from one Guideline range to a higher range"). That question is squarely presented here. The question is extraordinarily important, affects a fundamental aspect of our criminal justice system, and warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,
v.
KENNETH B. TERRY, A/K/A "KENNY POLO,"
DEFENDANT, APPELLANT.

No. 00-1079

Heard Oct. 2, 2000.
Decided Jan. 10, 2001.

Before TORRUELLA, Chief Judge, LYNCH and LIPEZ, Circuit Judges.

LYNCH, Circuit Judge.

Kenneth Terry was convicted by a jury on evidence that he was a dealer in crack and powder cocaine. He argued in his defense that he was a former dealer trying to lead a clean life until he was pressured and enticed into the life of crime again by two undercover police informants. His appeal argues that the jury's rejection of his entrapment defense resulted from the trial judge's error in instructing the jury on entrapment. He also argues that his sentence was too severe because the government engaged in manipulation of his sentence by enticing him to deal specifically in crack cocaine, and that the trial judge erred, in any event, in the amount of the drugs attributed to Terry. His last argument is that, under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435

(2000), certain matters that the trial judge used to increase his sentence—that is, the fact of a prior conviction, the amount of drugs involved in the charged offense, and the consideration of another transaction the court considered "relevant conduct"—were issues which should have been resolved by the jury and not by the judge. We reject these arguments and affirm the conviction and sentence.

I.

We describe the evidence as the jury could have found it. Kenneth Terry and Rafael Perez became acquainted in the early 1990s. Perez was then regularly supplying large quantities of cocaine to a Boston drug dealer named David Dinkins, who converted the powder cocaine into crack cocaine and sold it to customers. Perez regularly saw Terry at the Dinkins apartment, where Terry was a large and steady customer. Terry and Perez both knew Aundra Bennett, another customer. Dinkins, Terry, Perez, and Bennett at least once traveled together to New York City to purchase cocaine there.

Dinkins died in late 1995. In January 1996, Terry and Perez entered into a partnership in which Perez supplied Terry with crack cocaine for sale to Terry's customers. In early 1997, Bennett (now cooperating with federal DEA agents) contacted Terry seeking to purchase drugs. Terry, in response, told Bennett to page Perez, and that he would tell Perez that Bennett would be paging him, so that Perez would respond to the page. In February 1997, Bennett contacted Perez and set up a purchase of 125 grams of powder cocaine, and the sale was made on February 12. In March 1997, Bennett contacted Terry, complaining that Perez had failed to respond to another of his pages; Terry said that he would have Perez call Bennett. Perez later called Bennett and arranged the sale of 250 grams of powder cocaine, made on March 11.

In a chance encounter in late May 1997, Terry quoted Bennett a price of $3700 for 125 grams of crack cocaine.

When Bennett did not get back to him, Terry called Bennett and offered to lower the price to $3200, and in June 1997, Bennett contacted Terry and agreed to purchase 125 grams at that price. On June 12, Terry sold approximately 125 grams of crack cocaine to Bennett. On June 23, 1997, Bennett contacted Terry again, and on June 24, Terry sold Bennett approximately 250 grams of crack cocaine. Again, on July 30, 1997, Terry sold Bennett approximately 250 grams of crack cocaine. During this sale, Terry told Bennett that he was suspicious that there was police surveillance. Bennett had no further contact with Terry for about a year.

In July 1998, at the DEA's request, Bennett contacted both Perez and Terry to discuss a purchase of two and one-half kilograms of crack cocaine. After several discussions negotiating price and logistics, Terry told Bennett that Perez's supplier wanted to confirm that the money was there. Bennett arranged to show Terry the $48,000 in cash, but the meeting aborted when Terry told Bennett that he had observed police surveillance. No deal was made.

On July 27, 1998, Perez was arrested on state warrants and Perez offered to cooperate. Under instructions, Perez contacted Terry on July 29 and sought to arrange a sale of two to three kilograms of cocaine. Perez and Terry had several conversations about the purchase and Terry's efforts to find customers. On August 3, Perez told Terry that his supplier wanted to see the money first, and Terry replied that his customers were reluctant to give it to him. In the ensuing negotiations, Perez said that he had been wanting to deal with this supplier for the longest time. He told Terry that Terry had to "get me on" this deal because "this is the deal that I had been waiting for." Perez urged Terry to help him get "out of this mess" created by Perez's drug debts. When Terry was again recalcitrant about showing the money, Perez urged Terry to find a way, saying that "this is the opportunity of my lifetime."

Perez also suggested that he might seek out other customers for the cocaine.

On August 4, Terry told Perez that if his customers gave him the money, Terry would have to accompany Perez to the sale. Terry later told Perez that he only wanted to purchase one kilogram of cocaine. Perez agreed, and arrangements were made to meet that evening. That evening, at the agreed meeting point, Terry was arrested with approximately $19,000 in cash in his possession.

The final indictment contained seven counts against Terry and/or Perez. Count One charged both Terry and Perez with conspiracy to distribute powder cocaine and crack cocaine in Boston from January 1996 to July 1998, in violation of 21 U.S.C. § 846. Counts Two and Three charged Perez with distribution of cocaine in connection with the February 12 and March 11, 1997 sales to Bennett in violation of 21 U.S.C. § 841(a)(1). Counts Four, Five, and Six charged Terry with distribution of crack cocaine for the June 12, June 24, and July 30, 1997 sales to Bennett, in violation of 21 U.S.C. § 841(a)(1).[1] Count Seven charged Terry with attempted possession of crack cocaine with intent to distribute in connection with the final August 4, 1998 attempted purchase, again in violation of 21 U.S.C. § 841(a)(1).[2]

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[1] The conspiracy count and each distribution count against Terry contained a notice stating that the offense involved 50 grams or more of cocaine base and that the ten-year minimum mandatory sentence set forth in 21 U.S.C. § 841(b)(1)(A)(iii) was applicable.

[2] While the indictment charged attempted possession of crack cocaine in Count Seven, the deal arranged between Terry and Perez actually involved powder cocaine. During trial, the government sought to amend the indictment to reflect this fact,

At trial, Terry did not challenge the facts charged but instead presented an entrapment defense. Terry argued that Bennett threatened him, leading him to make the 1997 sales, and that Perez made undue appeals to sympathy to induce him to undertake the 1998 attempted purchase. The entrapment defense only responds to Counts Four to Seven, and does not go to the general conspiracy charge in Count One. In closing, Terry's lawyer argued that Bennett and Perez used "excessive pressure, threats, and appeals to sympathy" to induce Terry to commit the crimes charged. At the conclusion of trial, the district court instructed the jury on entrapment, giving a full charge. However, the court later made a correction to the jury verdict form, and then expanded upon the entrapment instructions by use of example, this time omitting reference to "appeals to sympathy." The alleged impact of this correction and expansion provides one of the bases of this appeal. The jury returned its verdict, finding Terry guilty on all counts.

At the sentencing hearing, the district court determined that Terry was responsible for 2.7 kilograms of crack cocaine and 370.9 grams of powder cocaine, and therefore set Terry's offense level at 38. The district court also determined that Terry's prior drug conviction[3] put him in criminal history category IV. Together these provided for a Guidelines sentencing range of 324-405 months imprisonment. The court denied Terry's request for downward departure and sentenced Terry to 324 months, the low end of the applicable range.

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and the trial court agreed, though it noted that as a result of the amendment, it would not include the amount of drugs from this deal in sentencing calculations.

[3] In 1992, Terry had served six months on federal charges of conspiracy to distribute cocaine.

II.

A. The Jury Instructions

Terry argues that he was entitled to an instruction that entrapment may consist of "an undue appeal to sympathy." Under *United States v. Gendron*, 18 F.3d 955, 961-62 (1st Cir.) *cert. denied*, 513 U.S. 1051, 115 S.Ct. 654, 130 L.Ed.2d 558 (1994), playing upon defendant's sympathy is indeed one of the methods of entrapment this circuit recognizes.

Here, the judge did give exactly that instruction. Initially the court charged the jury that there was no entrapment if the government proved beyond a reasonable doubt that the officers and undercover agents:

> did not persuade or talk Mr. Terry in to committing the crime. Simply giving someone an opportunity to commit a crime is not the same as persuading the person to commit a crime, but excessive pressure by the law enforcement people, the undercover informants, or an undue appeal to sympathy, can be improper.

Terry challenges not this charge but rather a problem that arose later.

Terry contends that the jury may have been misled by a sequence of three events which, he says, made it appear the judge told the jury that this earlier instruction was in error. At the end of the instruction the judge told the jurors that he would be back to them, after he talked with counsel, if there were any matters needing clarification or mistakes needing correction, ending his instructions by stating

> Now, I may have left something out, I may have explained some aspect of the law improperly, and before we let you retire and call off the

> alternates the lawyers get a chance to call that to my attention, so I'll see counsel at the side bar.

At the ensuing side bar, Terry's counsel objected to the entrapment instruction as inadequate, and asked that the court more fully describe examples of improper inducement as laid out in *Gendron* and *United States v. Gamache*, 156 F.3d 1 (1st Cir.1998). Counsel stated that under these cases:

> the examples of improper inducement includes intimidation or threats, substantial pressure through persistent efforts to induce criminal activity over an extended period of time, appeals to sympathy, and false statements or other conduct which creates a risk of causing an otherwise unwilling person to commit the offense.

The court agreed to give this charge, with the exception of "appeals to sympathy," and Terry's counsel noted his objection. Also at side bar, the government noted that a mistake had been made in the jury form on Count Seven, which mistakenly stated that the offense involved cocaine base instead of reflecting the amendment of the charge to powder cocaine.

After conferring with counsel, the judge then returned to the jury and stated that there had been a mistake, saying "There is—I did make a mistake and it's a mistake of, what I'm going to have to do is change the verdict slip." The judge went on to explain that the verdict slip for Count Seven would be changed to say powder cocaine, not cocaine base. The court then continued, going on to give the *Gendron* charge requested by Terry's counsel at the side bar, though now omitting the "appeals to sympathy" language, stating:

> One other thing I would like to tell you is to just give you some examples of improper inducement as they are found in the law.

> Intimidation or—improper inducement which could constitute entrapment. Let me go back to that. Improper inducement to commit a crime which could constitute entrapment. I'm just giving you some examples:
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> Intimidation or threats; substantial pressure through persistent efforts to induce criminal activity over an extended period of time; false statements or other conduct which creates a risk of causing an otherwise unwilling person to commit the offense.

Given this sequence of events, Terry argues, the jury could have understood this clarification of the entrapment instructions by the judge as saying that the earlier instructions on entrapment were error. This problem was compounded, says Terry, when the judge gave new entrapment instructions by giving examples of entrapment through pressure but did not, despite defendant's request and no government objection, give again the "undue appeals to sympathy" instruction. And so, Terry concludes, the jury may have been left thinking that the revised instructions removed "undue appeals to sympathy" as a method of entrapment. This omission was important, Terry maintains, because part of his defense relied on the seductive blandishments of Perez as well as the fear-inducing pressure of Bennett, and so he depended on the undue appeals to sympathy instruction.

Trials are fast moving events and transcripts do not always capture the truth of the moment. We cannot be entirely sure from the cold transcript whether it was clear to the jury that the mistake alluded to by the trial judge pertained only to a matter other than the entrapment instruction. The government attorney says that it was clear; defendant demurs. We think the likelihood of a mistaken impression by the jury is very low, given that the judge started the topic of instructions by saying,

"One *other* thing I would like to tell you is to just give you some examples of improper inducements as they are found in the law" (emphasis added). Also telling is that defense counsel did not object on the ground that the jury misunderstood and thought the original entrapment instruction had also been a mistake. What we can say was that in context the jury was fairly instructed on the defense theory, and that suffices.

The importunings by Perez occurred late in the game for Terry. The government had set up a series of drug buys with Terry through Bennett in 1997 (the subject of Counts Four, Five, and Six). In 1998, another transaction was set up with Perez (Count Seven). Terry agreed to do the 1998 deal and then Terry and Perez started haggling over terms. Trying to convince Terry to front the money for the transaction, Perez implored Terry that this was the deal of a lifetime, that it would enable Perez to put behind him some heavy debts, and the like. These statements by Perez are the source of the claim for an "undue appeal to sympathy" instruction. Thus the case involved two different entrapment theories: fear and pressure as to the Bennett transactions in 1997 and appeals to sympathy in the Perez transaction in 1998. The Bennett transactions were more numerous and more important, in many ways, to Terry's defense. A jury that rejected entrapment for a number of transactions in 1997 with Bennett was unlikely to accept entrapment as a defense in a 1998 transaction with Perez. That is particularly so because no intimidation was involved in the 1998 transaction but only statements to the effect that Terry, having already agreed to do the transaction, should do it on particular financial terms as a favor to Perez.[4]

In this context, the trial judge agreed to the defense's request to supplement the jury instructions by giving examples

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[4] Also recall that the trial judge did not include the 1998 transaction (Count Seven) in his sentencing calculations.

of "improper inducements." The court had already earlier instructed the jury that "[s]imply giving someone the opportunity to commit a crime is not the same as persuading the person to commit a crime, but excessive pressure by the law enforcement people, the undercover informants, or an undue appeal to sympathy, can be improper." The judge then supplemented this earlier instruction by telling the jury he was giving it some examples of improper inducements: "Intimidation or threats; substantial pressure through persistent efforts to induce criminal activity over an extended period of time; false statements or other conduct which creates a risk of causing an otherwise unwilling person to commit the offense." These latter two descriptions encompass both Bennett's and Perez's efforts, and so go to both the undue appeals to sympathy and fear prongs of the entrapment defense. Thus, this case is not like *United States v. Montanez*, 105 F.3d 36 (1st Cir.1997), where the court held that instructions on entrapment giving examples applicable only to inducement through fear are insufficient where the defense theory rests on appeals to sympathy.

Although the court did not explain why it refused to use again the phrase "undue appeal to sympathy," it is reasonable to think that the court itself did not want, by repeating the instruction, to give undue weight to one aspect of the defense, and the more minor part of the entrapment defense at that. Taken as a whole, the defense theory was fairly captured by the instructions given. *See United States v. Arcadipane*, 41 F.3d 1, 8 (1st Cir.1994) ("[J]ury instructions are to be evaluated in the context of the charge as a whole...."). For these reasons, we uphold the conviction the jury arrived at on those instructions.

B. Sentencing Factor Manipulation

Terry says that the government agents improperly subjected him to the higher penalties imposed for crack cocaine, insofar as they ordered their informant Bennett to

make purchases of crack cocaine from Terry, especially after having Bennett purchase only powder cocaine from Perez. Terry also argues that the DEA strung out the investigation in order to have more deals and thereby have a larger amount of drugs to attribute to him. *See United States v. Montoya*, 62 F.3d 1, 3-5 (1st Cir.1995) (holding that sentencing factor manipulation should be found where, through extreme or outrageous conduct, "government agents have *improperly* enlarged the scope or scale of the crime" through their control over the sting operation) (emphasis in original). In light of this purported manipulation, Terry contends that he should have been given a downward departure on his sentence, as he requested. The district court denied the request, saying that it did not believe that Terry was "an innocent person who took a bite at the poisoned apple." The decision of the district court not to grant such a downward departure is reviewed for clear error. *Id.* at 4.

The evidence does not support the claim of government misconduct. Perez testified that he and Terry had sold both crack and powder cocaine since January 1996 and that Terry regularly received large supplies of crack. In his discussions with the informants Terry had a ready facility with the street prices of both crack and powder cocaine and quoted prices for kilograms of both. The government, when investigating the business of a drug dealer who by reputation sells both crack and powder cocaine, is under no obligation to buy only that product or quantity which would produce the smallest sentence for the defendant. As to the duration of the investigation, the government says it was attempting to trace other individuals involved in the drug network, to establish that Terry was a dealer in both substances, and to remove the narcotics from the streets—surely all permissible purposes. This is simply not the "extreme and unusual case" for which the sentencing factor manipulation doctrine was meant. *Montoya*, 62 F.3d at 4; *see also United States v. Gibbens*, 25 F.3d 28, 31 (1st Cir.1994)

(stating that finding of sentencing factor manipulation must rest on a finding of "extraordinary misconduct" by the government).

C. Sufficiency of the Evidence on Drug Quantities

Terry also argues that the district court committed clear error in attributing to him the quantities of drugs involved in two transactions that were not charged to him: Perez's sale of powder cocaine to Bennett and crack possessed by Andre Morris.

Perez sold some 370.9 grams of powder cocaine to Bennett in February and March 1997. Those sales both took place before Bennett and Terry had made a transaction. Under the Guidelines, acts of third parties are attributable to a defendant if they are taken in furtherance of a joint criminal activity and they are reasonably foreseeable. *See* U.S.S.G. § 1B1.3(a)(1)(B) (in determining the offense level in light of relevant conduct, courts consider "in the case of a jointly undertaken criminal activity..., all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity"); *see also* U.S.S.G. § 1B1.3 cmt. (background) ("[D]rugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction."); *United States v. LaCroix*, 28 F.3d 223, 226-28 (1st Cir.1994). Terry's theory is that while Terry and Perez may have had a business arrangement, it had nothing to do with the separate arrangement between Perez and Bennett. Even if there were some relationship between the two business arrangements, Terry argues, he had no reason to think that Perez would sell drugs to Bennett as a result of Terry's giving Perez's phone number to Bennett.

The district court's contrary conclusion was plainly supported by the evidence. When Bennett called Terry in March 1997, the two men discussed drug prices, Terry gave Bennett the phone number to reach Perez, and said that Perez

would "take care of him." Terry then called Perez to be sure that he knew Bennett would try to reach him. That was enough to link Terry to those transactions.

The second argument is that some 64 grams of crack, found in the car of Andre Morris after his arrest on January 16, 1997, could not be attributed to Terry. The two men had just conducted a drug transaction in a parking lot and Terry was also arrested then. Terry did not raise this issue before the district court, and so it is waived. We note that, in any case, even if the amount of these drugs were subtracted from the total, Terry's offense level would remain the same.

D. *Apprendi* Issues

Terry was sentenced to 27 years imprisonment. After this appeal was briefed, the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-63; *see also Sustache-Rivera v. United States*, 221 F.3d 8 (1st Cir.2000). Counsel filed supplemental briefs on the effect of *Apprendi* on this case.

Kenneth Terry raises three *Apprendi* issues involving his sentence. At sentencing, the court calculated his sentence on the basis of its determination of (1) his prior conviction for a drug offense, (2) the quantity of drugs involved in the conduct underlying the convictions, and (3) additional quantities of drugs involved in "relevant conduct" for which he was not charged or convicted. None of these facts were charged in the indictment nor submitted to the jury for proof beyond a reasonable doubt. Terry argues that the court's reliance on these determinations at sentencing deprived him of his right to a jury trial, as the determinations are properly enhancement elements that must be proven to the jury beyond a reasonable

doubt rather than sentencing factors that the judge may determine by a preponderance of the evidence.

The relevant statutory provisions provide statutory sentencing maximums for a violation of 21 U.S.C. § 841(a)(1)[5] as follows: 21 U.S.C. § 841(b)(1)(A) provides for a maximum penalty of life where the offense involves 50 or more grams of cocaine base; 21 U.S.C. § 841(b)(1)(B) provides for a maximum sentence of 40 years where the offense involves 5 or more grams of cocaine base; and 21 U.S.C. § 841(b)(1)(C) provides a statutory maximum sentence of 20 years for any conviction not otherwise covered regardless of amount, except that the maximum sentence increases to 30 years where there is a prior finalized conviction for a drug offense. Terry was sentenced to 324 months, or 27 years, in prison, plus 10 years supervised release, on the four counts of conviction.[6]

The only objections[7] at sentencing regarding these three determinations did not address the failure to have these three matters submitted to the jury for proof beyond a reasonable doubt. Nor were the arguments in the initial briefs on appeal

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[5] Unlike the other counts, Count One found Terry in violation of 21 U.S.C. § 846. However, § 846 adopts the sentencing scheme of 21 U.S.C. § 841.

[6] In accordance with the court's agreement to allow the government to amend Count Seven, the court based Terry's sentence solely on Counts One, Four, Five, and Six.

[7] The defense did object to the amount of drugs, but only to the extent that the Perez-Bennett transactions were included, as addressed above; the only objection to the prior conviction was that it was "over-representative" and therefore grounds for a departure under § 4A1.3.

addressed to this point. As a result, our review of these three claimed errors is for plain error.

Review for plain error requires four showings: (1) that there was error; (2) that it was plain; (3) that the error "affect[ed] substantial rights"; and (4) that the error affected the "fairness, integrity, or public reputation of judicial proceedings." *See Johnson v. United States*, 520 U.S. 461, 465-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *cf. United States v. Mojica-Baez*, 229 F.3d 292, 306-07 (1st Cir.2000) (applying plain error review to failure to submit to the jury whether a semiautomatic assault weapon was used in an offense under 18 U.S.C. § 924(c)(1), as required under *Castillo v. United States*, 530 U.S. 120, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000)). After examining the facts of this case, we conclude that there was no plain error.

Apprendi, in a sense, was a simpler case. It was a state case with a single statutory maximum penalty, subject to an enhancement. It did not involve the complex charting and several potential maximums of the federal Sentencing Guidelines that are involved here. The federal drug statute provides for a structure of gradations in maximum sentences. *See* 21 U.S.C. § 841(b)(1). The maximum possible sentence for distributing cocaine, provided no bodily harm results, would be life imprisonment. But that is subjected to gradations based on the amount of drugs involved: if the amount of drugs were less than 5 grams, then the statute provides for a maximum sentence of 20 years; if the offense involved 5 to 50 grams of drugs, then the mandatory sentencing range provided by the statute is 5 to 40 years; at 50 grams, the maximum penalty increases to life. Here, even apart from the amount of drugs involved, because of a prior conviction for a drug crime, Terry

faced (at the lowest) a maximum sentence of 30 years under 21 U.S.C. § 841(b)(1)(C).[8]

Quite properly, no one suggests that there be separate *Apprendi* analyses for each separate possible maximum. Both sides agree that if the 30 year maximum for the prior felony conviction holds, then there is no *Apprendi* issue in this case as to whether the jury must determine whether the trigger point in the drug quantity range had been met. Presumably, the reason for that agreement is that defendant was sentenced to 27 years, within the 30 year maximum sentence when there is a prior drug felony. Thus if Terry loses on his first claim—that the fact of the prior drug conviction had to be decided by the jury—then his second and third claims disappear, because he was sentenced within the prescribed range. *Cf. United States v. Baltas*, 236 F.3d 27 (1st Cir.2001) (holding that *Apprendi* does not apply to drug quantity determinations where the judge-made factual determination does not increase the maximum sentence beyond the statutory maximum).

Terry's first attack, unfortunately for him, would require this court to overrule the Supreme Court decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *Almendarez-Torres* held that the use of the fact of a prior conviction in sentencing, where that fact was found by the judge rather than the jury, did not violate the right to a jury trial. Terry points out that if you count heads, the combination of the justices in the majority in *Apprendi* and in the dissent in *Almendarez-Torres* would provide a majority on the Supreme Court to overrule *Almendarez-Torres*. Perhaps so, but until *Almendarez-Torres*

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[8] And to further complicate matters, if the sentences for each count ran consecutively rather than concurrently, the statutory maximum (even without the prior conviction) would be 80 years.

is overruled, we are bound by it. This means that Terry's sentence was within the 30 year statutory maximum, and so *Apprendi* does not apply. *See, e.g., Talbott v. Indiana*, 226 F.3d 866, 869 (7th Cir.2000) (holding that *Apprendi* does not change the fact that the judge alone determines drug types and quantities when imposing sentences short of the statutory maximum).

Lest Terry be left with unrealistic hopes for a future vindication, we make a second holding against him. Even were *Almendarez-Torres* overruled, it is clear that Terry cannot establish plain error as to the fact that a judge, not a jury, decided the drug quantity. Even assuming *arguendo* that *Apprendi* would apply here, were there no prior conviction,[9] Terry fails at least the third and fourth elements of the test for plain error.

Under the "affecting substantial rights" prong, Terry must show prejudice by demonstrating that the error "affected

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[9] Several courts to have addressed the application of *Apprendi* to drug amounts have found them to be enhancement elements properly submitted to the jury where the drug quantity extends the sentence beyond the otherwise applicable maximum. *See, e.g., United States v. Sheppard*, 219 F.3d 766, 767 (8th Cir.2000) ("Based upon the Supreme Court's recent decision in *Apprendi v. New Jersey*, ...we conclude that drug quantity must often be treated as an element of the offense under § 841...."); *United States v. Williams*, 235 F.3d 858, 863 (3rd Cir.2000) *United States v. Hishaw*, 235 F.3d 565, 574-76 (10th Cir.2000); *United States v. Shepard*, 235 F.3d 1295, 1296 (11th Cir.2000); *United States v. Flowal*, 234 F.3d 932, 936 (6th Cir.2000); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir.2000); *United States v. Angle*, 230 F.3d 113, 124 (4th Cir.2000); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir.2000). We do not reach the issue.

the outcome of the district court proceedings." *Mojica-Baez*, 229 F.3d at 307 (internal quotations omitted). We ask what prospects there were that the submission of the question—whether the trigger drug quantity amount was met[10]—to the jury would have resulted in a different outcome, keeping in mind the higher standard of proof required before a jury. *Cf. id.* Given the trial evidence about the quantity of drugs, there was no prejudice to Terry. In each of the three transactions in 1997, Terry directly sold Bennett, a cooperating witness, far more than 50 grams of cocaine base in controlled buys. The uncontested testimony of a DEA chemist at trial established the quantities and types of the drugs involved in these sales. The defendant's defense of entrapment conceded that these events occurred as charged. It is not possible to find that the defendant was prejudiced by the unobjected-to failure of the trial court to submit to the jury the question of whether or not Terry's offenses involved 50 or more grams of cocaine base. Nor would we, applying the fourth factor under *Olano*, find any miscarriage of justice.

Nor does the failure of the indictment to specify that the offenses involved 50 or more grams of cocaine constitute an error of sufficient dimension to justify vacating Terry's sentence. *See Mojica-Baez*, 229 F.3d at 308-10. We review the alleged indictment error in this case for plain error. *See id.* at 311. The indictment was entirely proper under the law at the time, and there was no unfairness to the defendant in terms of notice.[11] Nor is there any reason to believe that the grand jury

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[10] Although some courts have referred to the jury deciding drug quantity, more precisely, the issue for the jury may instead be which trigger amount applied.

[11] For the conspiracy count and each distribution count, the indictment did include a notice that the offense involved 50 or more grams of cocaine base and therefore conviction

would not have returned an indictment including such amounts if requested. As it happens, the evidence as to the amount of drugs was presented to the petit jury, and not contested by the defendant. That evidence may well have been presented to the grand jury; we do not know. There is no question that the petit jury in this case would have found Terry's offenses to involve 50 or more grams of cocaine base. Since the failure to include the amount of drugs involved in the indictment did not necessarily render the indictment unfair or make it an unreliable vehicle with which to commence proceedings in this case, we reject the argument that *Apprendi* requires the sentence be vacated on the basis of that failure. *Cf. id.* at 311-12.

III.

We affirm the conviction and sentence imposed by the district court.

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compelled the application of at least the ten-year minimum mandatory sentence required by § 841(b)(1)(A)(iii).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES, APPELLEE,

v.

KENNETH B. TERRY, A/K/A "KENNY POLO," A/K/A "POLO," DEFENDANT, APPELLANT.

No. 00-1079

JUDGMENT
Entered: January 10, 2001

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The conviction and sentence imposed by the district court are affirmed.

Certified and Issued as mandate under Fed. R. App. P. 41

By the Court:

Phoebe Morse, Clerk.

/s/ _____
Clerk

By /s/ _____
Chief Deputy Clerk.

/s/ _____
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
v.
KENNETH TERRY

Criminal No. 98-10242-WGY

DISPOSITION

[Filed January 18, 2000]

BEFORE: The Honorable William G. Young, District Judge.

* * * * *

[49] * * * THE COURT: * * *.

Mr. Kenneth Terry, in consideration of the offenses of which you stand convicted, the information from the United States Attorney and your attorney, this Court [50] sentences you on each of Counts 1, 4, 5 and 6, to 27 years in the custody of the United States Attorney General; on Count 7, the Court sentences you, excuse me, to—

MR. PRINCE: Your Honor? Your Honor, I thought Count 7 was not going to be included.

THE COURT: Am I mistaken?

MR. PRINCE: If you recall, the government attempted to amend—

THE COURT: I did. Count 7 is out. This sentence is sufficient to Counts 1, 4, 5 and 6, 27 years in the custody of the United States Attorney General on each count, the sentence on each count to run concurrent one with the other. A five year—a $400 special assessment. Thereafter, ten years of supervised release. During the period of supervised release you are prohibited from possessing a firearm or other dangerous weapon. You are to participate in a program for substance abuse which program may have, include testing to determine whether you are using alcohol or drugs.

There will be no fine—let me see here. There will be no fine in view of your inability to pay a fine.

Now, let me explain this sentence. As you see it this case is filled with a great deal of moral ambiguity. And I have thought long and hard before imposing the sentence. So let me say straight out, I don't believe you. [51] Because if I believed you then this sentence, and I want to put this on the record; if I believed you this sentence would be improper.

I'll tell you what I do believe. I believe that there was enough evidence here that were I of a mind to do it, I could have departed downward either on the ground of sentencing manipulation or on the ground of duress as Mr. Prince properly argued.

I, I try not to depart downward. Though I do believe as you quite rightly said that they sent out a fellow to get you. They bought him and they sent him out to bring you down, to get you.

The piece I don't believe, and I have thought long and hard about this, is that you cast yourself as an innocent person who took a bite at the poisoned apple based on all the evidence.

I must take responsibility for it, and I do, and I have thought about it. I believe that in fact you were dealing drugs and dealing drugs in a big way. And, your reticence to get involved with the fellow they sent after you was just your caution as one who was engaged in this activity.

But it should be stated on the record that if you were believed in your recitation here, you would nevertheless be guilty, but that the sentence I imposed [52] would be an improper sentence.

So, I just don't believe it. I think the government has proved your conduct, insofar as the sentencing hearing goes, by a fair preponderance of the evidence. This is a just sentence under the law.

You will have such time as you have been in custody counted towards the sentence. And I do state to you, you have the right to appeal from any findings or rulings that I have made against you.

That is the sentence of the Court. We'll recess.

THE CLERK: All rise.

(Whereupon the matter concluded.)

(Adjournment.)

[53] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

I, Donald E. Womack, do hereby certify that the above proceedings were reported by me stenographically and this transcript represents a true and accurate transcription of said proceedings.

/s/ Donald E. Womack

DONALD E. WOMACK
Official Court Reporter
1 Courthouse Way, Suite 5510
Boston, Massachusetts 02210
(617) 439-8877

APPENDIX D

21 U.S.C. § 841[1]

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

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[1] This is the current version of the statute, which does not materially differ from the controlling version. See Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. No. 106-172, 114 Stat. 7 (2000) (amending 21 U.S.C. § 841 in ways not relevant to this case).

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a

mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants

regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of

twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal

property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be

imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Redesignated (f)